

NO. SC89752

**IN THE
SUPREME COURT OF MISSOURI**

**STATE EX REL. JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL, THE
MISSOURI DEPARTMENT OF NATURAL RESOURCES, AND THE MISSOURI
DAM AND RESERVOIR SAFETY COUNCIL,**

Appellant,

vs.

PAUL AND MARILIL OLIVE,

Respondents.

**Appeal from the Greene County Circuit Court
The Honorable J. Miles Sweeney**

SUBSTITUTE BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

Respondents are satisfied with the accuracy and completeness of the Jurisdictional Statement set forth in appellant's brief.

STATEMENT OF FACTS

Respondents are satisfied with the accuracy and completeness of the Statement of Facts set forth in appellant's brief, except that appellant failed to include the following: In its Petition, in addition to the allegation that the Olives did not properly "register" Rainbow Lake Dam in violation of section 236.440.3 of the Missouri Revised Statutes, appellant also asserted that the Olives "have violated, and continue to violate, the Missouri Dam and Reservoir Safety Law, sections 236.400 through 236.500, RSMo., and its regulations, by: (1) failing to properly apply for and obtain a construction permit for Rainbow Lake Dam in violation of 236.435, RSMo...." (LF. 10).

POINTS RELIED ON

I.

(Responding to Appellant's First Point Relied On)

THE TRIAL COURT DID NOT ERR IN GRANTING THE OLIVES' MOTION FOR SUMMARY JUDGMENT BECAUSE THE PERMITTING REQUIREMENTS IN SETIONS 236.435.1 AND 236.435.3 OF THE SAFETY LAW ARE BEING APPLIED RETROACTIVELY AND/OR RETROSPECTIVELY, AND SUCH AN APPLICATION IS UNCONSTITUTIONAL.

Beatty v. State Tax Commission, 912 S.W. 2d 492 (Mo. 1995)

Corvera Abatement Technologies, Inc. v. Air Conservation Commission, 973 S.W.2d 851 (Mo. banc 1998)

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Webster v. Myers, 779 S.W.2d 286 (Mo. Ct. App. 1989)

Mo. Rev. Stat. § 236 (2000)

Mo. Rev. Stat. § 236.440.3 (2000)

II.

(Responding to Appellant's Second Point Relied On)

THE TRIAL COURT DID NOT ERR IN GRANTING THE OLIVES' MOTION FOR SUMMARY JUDGMENT BECAUSE SECTION 236.435.7 EXEMPTS SOIL AND WATER CONSERVATION DAMS FROM STATUTORY REQUIREMENTS TO REGISTER DAMS AND TO ENSURE THEIR SAFE CONSTRUCTION AND OPERATION, AND THE OLIVES' DAM FALLS WITHIN THE EXEMPTION.

Mo. Rev. Stat. § 236 (2000)

Mo. Rev. Stat. § 236.435.7 (2000)

III.

(Responding to Appellant's Third Point Relied On)

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTIONS TO EXHIBITS AND MOTION TO STRIKE BECAUSE THE EXHIBITS ARE A PROPER BASIS FOR GRANTING THE MOTION FOR SUMMARY JUDGMENT AND THE EVIDENTIARY MATERIALS SUPPORTING THE OLIVES' MOTION DID NOT LACK FOUNDATION AND WOULD HAVE BEEN ADMITTED AT TRIAL.

Anderson v. Cole, 136 S.W. 395 (Mo. 1911)

Kansas City Area Transportation Authority v. 4550 Main Associates, Inc., 742 S.W.2d 182 (Mo. Ct. App. 1988)

Kansas City v. Scarritt, 69 S.W. 283 (Mo. 1902)

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN GRANTING THE OLIVES' MOTION FOR SUMMARY JUDGMENT BECAUSE THE PERMITTING REQUIREMENTS IN SETIONS 236.435.1 AND 236.435.3 OF THE SAFETY LAW ARE BEING APPLIED RETROACTIVELY AND/OR RETROSPECTIVELY, AND SUCH AN APPLICATION IS UNCONSTITUTIONAL.

Section 236.440.3 states:

Owners of dams and reservoirs in existence on September 28, 1979, shall obtain registration permits for dams of fifty to seventy feet in height within four years, and for dams up to fifty feet in height within six years of September 28, 1979, or as otherwise required by the provisions of sections 236.400 to 236.500 and rules and regulations adopted hereunder. A registration permit shall be issued by the council upon the advice of the chief engineer for dams and reservoirs only after it is determined that the dam meets the standards of sections 236.400 to 236.500 and rules and regulations hereunder, and any recommendations made by the inspecting engineer pursuant thereto.

On its face, section 236.440 applies retrospectively. In *State v. Thomaston*, 726 S.W. 2d 448, 459 (Mo. Ct. App. 1987), the court explained that “a retrospective law or

statute is a law applicable to civil proceedings ‘which looks backward or contemplates the past; one which is made to effect acts or facts occurring or rights accruing, before it came into force. Every statute which ... creates a new obligation, imposes a new duty, or attaches a new disability in respect to past transactions or considerations already in the past.’” *Id.* (internal citations omitted). A retrospective law gives “to something already done a different effect from that which it had when it transpired.” *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. 2006) (internal citations omitted).

The Missouri constitution “condemns laws that *operate* retrospectively.” See *Beatty v. State Tax Commission*, 912 S.W. 2d 492, 496 (Mo. 1995). Section 236.440 is not only retrospective on its face, but particularly retrospective in terms of its application to the facts of this case. Rainbow Lake Dam was built in 1974. (LF. 41, 62). Section 236 of the Missouri Revised Statutes was not enacted until 1979. (LF. 42, 64). Thus, at the time that Rainbow Lake Dam was built, there was no such requirement that dams “meet the standards of sections 236.400 to 236.500 and rules and regulations hereunder.” Nevertheless, appellant demands that the Olives go back and alter Rainbow Lake Dam to comply with the Dam and Reservoir Safety Council’s subsequently enacted standards. Appellant claims that the Olives are not entitled to a registration permit because of the “insufficient design and capacity of the emergency spillway.” (LF. 8). Appellant’s permitting requirements are unconstitutional.

Appellant’s attempted retrospective application of section 236 is similar to the State’s retrospective application of Megan’s Law in *Phillips*, 194 S.W.3d at 854. In *Phillips*, this Court held that portions of the sex offender registry law imposing an

affirmative duty to register based on pleas or convictions for conduct committed prior to the enactment of the registry law violated constitutional prohibition of laws retrospective in operation. *See id.* After rejecting retrospective arguments regarding other portions of the law, the Court discussed the law's registration requirement:

The same cannot be said, however, of the Does' additional argument that the bar on laws that operate retrospectively is violated by the imposition of an affirmative obligation on them to register upon release and then regularly thereafter. The obligation to *register* by its nature imposes a new duty or obligation. Respondent argues that this is unimportant because Megan's Law only criminalizes a failure to register and the Does could not have failed to register until after Megan's Law became effective. Here, however, the Does are not complaining that they have been held or will be held criminally liable for failing to register. They are complaining about application of the registration requirement to them, based solely on their pre-act criminal conduct. As to all but Jane Doe III, who was not convicted until 1998, the application of that requirement truly is retrospective in its operation. It looks solely at their past conduct and uses that conduct not merely as a basis for future decision-making by the state, in regard to things such as the issuance of a license,

or as a bar to certain future conduct by the Does, such as voting. Rather, it specifically requires the Does to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on their offenses prior to its enactment. This violates the standard set out in *Bliss* and violates our constitutional bar on laws retrospective in operation. *Id.*

Here, too, section 236's registration and construction permitting requirements operate retrospectively. Rainbow Lake Dam was built in 1974. At the time that it was constructed, the section 236 dam regulations did not exist (i.e., the spillway design and capacity requirements were not in place). Now, thirty-some years after Rainbow Lake Dam was constructed, appellant demands that the Olives go back and essentially reconstruct or redesign the dam and obtain a registration permit. Appellant's claim that the Olives are not entitled to a registration permit is specifically because of the "insufficient design and capacity of the emergency spillway." (LF. 8). The spillway is part of the design and construction of the dam. In the case of Rainbow Lake Dam, these specifications were determined long before section 236's enactment. Section 236's requirement that respondents redesign their dam on private property is as fundamentally unfair as a requirement that private homes be redesigned or upgraded every time new building codes are enacted.

None of the cases that appellant cites in support of its position are comparable to this one. For example, appellant states that the Court held in *Corvera Abatement*

Technologies, Inc. v. Air Conservation Commission, 973 S.W.2d 851 (Mo. banc 1998), that “where the State of Missouri applied an asbestos regulation only to acts that occurred after the rule’s enactment, the rule was not retrospective.” See Appellant’s Substitute Brief at p. 12. The rule at issue in *Corvera* regulated the manner in which asbestos containing materials were removed, and regulated the individuals that performed such abatement projects. See 973 S.W.2d at 855. That rule was amended and the asbestos company argued that the amendment violated its rights. See *id.* at 856. The court held that the amendments did not affect the company’s past transactions and therefore operated only prospectively. In addition, the court held that the company had “no vested right to insist that the requirements [of the rule] remain unchanged.” See *id.* Here, to the contrary, the design and construction of Rainbow Lake Dam is a “past transaction” that appellant some thirty years later seeks to regulate.

Similarly, appellant’s citation to *Webster v. Myers*, 779 S.W.2d 286 (Mo. Ct. App. 1989) is misplaced. *Webster* involved the Merchandising Practices Act, which was amended effective May 31, 1985 and allowed payment of civil penalties and the cost of prosecution of the action. See *id.* at 288. The state initially filed a petition involving violations that allegedly occurred in 1984 and sought civil penalties and cost of prosecution. See *id.* at 289. However, “the State acknowledged that the allowance of such penalties and awards would require a retrospective application of [the Act] and abandoned those claims.” See *id.* The only issue on appeal was whether the state could seek an injunction and restitution, which were also allowed under the pre-amended version of the Act. The court found no retrospective application because “the State is

only pursuing the substantive relief to which it was entitled under the law in effect in 1984.” *Id.* Here, on the other hand, Rainbow Lake Dam was built in 1974. At the time that it was constructed, section 236’s dam regulations regarding the spillway design and capacity requirements did not exist. Unlike in *Webster*, appellant does seek to apply a law to a transaction that occurred long before its enactment.

Contrary to appellant’s assertion, none of the cases that appellant cites regarding police powers stand for the proposition that appellant can eliminate the Constitutional protections against retrospective laws simply by referencing police powers. The *Corvera* and *Webster* cases discussed above do not state, as appellant argues, that the court is using police powers to justify upholding a law that is otherwise retrospective. Indeed, the words “police powers” do not even appear in those cases! Likewise, three of the “police power” cases that appellant cites do not even mention retrospective or retroactive laws. *See Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991); *Morrison v. Morey*, 48 S.W. 629 (Mo. 1898); *State ex rel. State Highway Commission v. Meier*, 388 S.W.2d 855 (Mo. banc 1965). *State v. Missouri Pac. R. Co.*, 147 S.W. 118, 126 (Mo. 1912), does mention retrospective laws, but the Court specifically stated that the law at issue (requiring corporations to pay employees as often as semimonthly) was “in no sense ex post facto or retrospective.” Thus, this line of cases is also unpersuasive for appellant.

Finally, appellant argues that “If this Court were to agree with the Olives that the Safety Law can only regulate dams built after the Safety Law because law, the result would be catastrophic. Aging dams would continue to deteriorate and ultimately fail,

with the State of Missouri powerless to compel improvements.” *See* Appellant’s Substitute Brief at p. 15. First, the Olives dispute that Rainbow Lake Dam is unsafe. Instead, the Olives believe that appellant’s suggested improvements to Rainbow Lake Dam are arbitrary and unreasonable. That, however, is an issue that is not before this Court and has no relevance to the Court’s determination as to whether appellant seeks to apply section 236 retrospectively.

Second, appellant could make a similar argument relating to the passage of almost any law (that some good is meant by the law). The bottom line is simple: appellant is attempting to do what the Missouri constitution specifically prohibits. There are other constitutional methods by which appellant could accomplish its purported goal with respect to Rainbow Lake Dam.

Because section 236 operates retrospectively with regard to the Olives, this Court should affirm the trial court’s ruling granting the Olives’ motion for summary judgment regarding the affirmative defense set forth in paragraph 40 of the Olives’ Answer.

II.

THE TRIAL COURT DID NOT ERR IN GRANTING THE OLIVES' MOTION FOR SUMMARY JUDGMENT BECAUSE SECTION 236.435.7 EXEMPTS SOIL AND WATER CONSERVATION DAMS FROM STATUTORY REQUIREMENTS TO REGISTER DAMS AND TO ENSURE THEIR SAFE CONSTRUCTION AND OPERATION, AND THE OLIVES' DAM FALLS WITHIN THE EXEMPTION.

In its Petition, appellant specifically alleged that the Olives “have violated, and continue to violate, the Missouri Dam and Reservoir Safety Law, sections 236.400 through 236.500, RSMo., and its regulations, by: (1) failing to properly apply for and obtain a construction permit for Rainbow Lake Dam in violation of 236.435, RSMo....” (emphasis added) (LF. 10). Appellant conveniently ignores that it explicitly sued the Olives for such a violation. Instead, appellant’s brief focuses only on the Olives’ alleged “registration permitting” violations of section 236.440.3.

Section 236.435.7 of the Missouri Revised Statutes states:

Dams or their construction, alterations, enlargements, reductions or removals designed by, and their construction, alteration, enlargement, reduction or repair or removal monitored by, a qualified engineer regularly engaged in dam construction for soil and water conservation or irrigation or relating to wildlife conservation are for the purposes of such construction or other listed actions exempt from the provisions

of this section except that the plans for the dam shall be filed with the chief engineer prior to construction, or other listed action. (emphasis added)

The Affidavit of William White and the documents attached to his affidavit demonstrate that Rainbow Lake Dam was designed by the United States Department of Agriculture, Soil Conservation Service. (LF. 44-54). The plans specifically state that an area engineer with that agency approved the plans. (LF. 46). Further, the Soil and Water Conservation Plan prepared for the property on which Rainbow Lake Dam is located shows that the Dam was intended for floodwater retardation purposes. (LF. 50, 51). Thus, the Dam falls squarely within the exemption set forth in section 236.435.7.

Section 236 of the Missouri Revised Statutes was not enacted until 1979. Thus, at the time that Rainbow Lake Dam was built in 1974, there was no such requirement that “the plans for the dam shall be filed with the chief engineer prior to construction, or other listed action.” *See* Mo. Rev. Stat. § 236.435.7 (2000). To hold that the Olives are not entitled to exemption based on their inability to file plans prior to construction (because the statute did not exist at the time) would be an unconstitutional retrospective application of section 236 as explained above.

Appellant states that if the Olives do qualify for the section 236.435.7 exemption, they are only exempt from the requirements of that specific section. This argument makes little sense. Section 236.435.7 exempts dams from construction permitting requirements. It would be a contradiction to allow a dam to be exempt from being constructed according to section 236’s regulations, but then make the dam otherwise

comply with the spillway requirements (determined at the time of construction) upon which appellant's Petition against the Olives is based. Again, appellant's position with respect to section 236.435.7 confirms that appellant seeks unconstitutional retrospective application of section 236 regarding the registration and construction requirements for Rainbow Lake Dam. Thus, this Court should affirm the trial court's ruling granting the Olives' motion for summary judgment regarding the affirmative defense set forth in paragraph 36 of the Olives' Answer.

III.

THE TRIAL COURT DID NOT ERR IN OVERRULING THE STATE OF MISSOURI'S OBJECTIONS TO EXHIBITS AND MOTION TO STRIKE BECAUSE THE EXHIBITS ARE A PROPER BASIS FOR GRANTING THE MOTION FOR SUMMARY JUDGMENT AND THE EVIDENTIARY MATERIALS SUPPORTING THE OLIVES' MOTION DID NOT LACK FOUNDATION AND WOULD HAVE BEEN ADMITTED AT TRIAL.

Mr. White's affidavit meets the criteria set forth in appellant's brief. As appellant acknowledges, Mr. White was the previous owner of the property where Rainbow Lake Dam sits. (LF. 44). Mr. White is the individual that built Rainbow Lake Dam. (LF. 44). Indeed, his name appears on all of the exhibits attached to his affidavit. (LF. 46-54). In those documents, he is listed as the "cooperator" or "landowner." (LF. 46-54). Thus, appellant's complaint that Mr. White cannot authenticate the documents or that he does not have personal knowledge regarding the events set forth in his affidavit is absurd.

In addition, the documents attached to Mr. White's affidavit are more than thirty years old. (LF. 46-54). For this reason, even if Mr. White did not have the requisite knowledge of the events or documents attached to his affidavit, the documents themselves would nevertheless qualify as "ancient documents." The ancient documents rule is one of evidence that sanctions the proof of facts by documents otherwise not admissible to prove statements amounting to hearsay. *Kansas City Area Transportation Authority v. 4550 Main Associates, Inc.*, 742 S.W. 2d 182, 186 n. 1 (Mo. Ct. App. 1988); *see also Kansas City v. Scarritt*, 69 S.W. 283, 286-87 (Mo. 1902) (fifty year old deed was

entitled to admission as an ancient document and “needed no other proof than it carried on its face.”); *Anderson v. Cole*, 136 S.W. 395, 396 (Mo. 1911) (thirty-some year old warranty deed was ancient document and its recitals were admissible as evidence of the facts stated therein).

This is not a situation where the Olives themselves attempted to authenticate or explain documents involving Rainbow Lake Dam that were created more than twenty years prior to their purchase of the property on which the dam sits. Instead, the Olives had the person with the most knowledge about the construction of the dam and the person who received the actual documents from the entities involved in the construction execute the affidavit in support of their summary judgment motion. For this reason, the trial court properly overruled appellant’s objections to and motion to strike these exhibits.

CONCLUSION

WHEREFORE, Respondents pray the Court for its order affirming the trial court's decision, and for such other relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 84.06(b)

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains 3,495 words, excluding the cover, this certification, as determined by Microsoft Word 2003 software; and
2. That the disk simultaneously filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a disk containing a copy of this brief, were mailed, postage prepaid, this 29th day of December 2008, to:

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